
HOUSE SCIENCE AND TECHNOLOGY COMMITTEE
MINORITY MEMORANDUM

On Thursday, May 24, 2007, the Subcommittee on Investigations and Oversight, Committee on Science and Technology will hold a hearing on *The NASA Administrator's Speech to Office of Inspector General Staff, the Subsequent Destruction of Video Records, and Associated Matters*.

BACKGROUND

NASA IG Investigation

Numerous allegations have been raised against the National Aeronautics and Space Administration (NASA) Inspector General (IG) Robert Cobb. These allegations range from raising his voice to subordinates and using profanity to obstructing justice. Of the 79 total accusations, most came from NASA OIG employees and were forwarded to the President's Council on Integrity and Efficiency (PCIE) by Sen. Bill Nelson.¹ A number of those allegations were previously reviewed by the PCIE and found to be baseless, but nevertheless included in the subsequent investigation in order to provide a "historical component."² While complaints against IGs are not uncommon, the number of allegations against IG Cobb is more than usual. It is also important to note that none of the allegations suggest any violation of law, rule, or regulation, as the PCIE process only addresses issues relating to administrative violations such as gross mismanagement, gross waste of funds, and abuses of authority.³

PCIE Process

Based on Executive Order (E.O.) 12805, which details the process by which allegations against IGs are adjudicated, all non-criminal accusations are forwarded to the President's Council on Integrity and Efficiency (PCIE), which then forwards the complaint to its Integrity Committee for review and investigation. The allegations against IG Cobb followed this process, and were subsequently forwarded to the Housing and Urban Development (HUD) IG who was ultimately tasked with conducting the investigation.

The HUD IG completed his investigation in August 2006, and forwarded his Report of Investigation (ROI) to the PCIE's Integrity Committee for review. The HUD IG's report contained only background information with no findings, conclusions, or recommendations. The Integrity Committee then reviewed the report and forwarded their findings to the PCIE Chair, Clay Johnson, Office of Management and Budget Deputy Director for Management. Their analysis concluded that IG Cobb had abused his authority by directing profanity at his staff and thus created a hostile work environment, and that his actions in certain instances created the appearance of a lack of

¹ Report of Investigation, Integrity Committee Case No. 500, Office of the Inspector General, U.S. Department of Housing and Urban Development.

² Letter from James Burrus, Chair, Integrity Committee, to Robert Cobb, Inspector General, NASA. February 22, 2006

³ Letter from James Burrus, Chair, Integrity Committee, to Clay Johnson, Chair, PCIE. January 22, 2007.

independence.⁴ It is important to note, however, that there is no *de minimis* threshold for an abuse of authority, and that the ROI found no evidence that IG Cobb lacked independence. The Integrity Committee decided not to recommend a course of action at that time.

NASA Review and Recommendations

In February, the PCIE Chair forwarded the ROI and the Integrity Committee's report to the NASA Administrator for his review and recommendations, as is allowed under the Executive Order establishing the PCIE process.⁵ The NASA Administrator then tasked the NASA General Counsel's office with reviewing the ROI and determining a recommended course of action. After pressure from the House Science Committee and the Senate Commerce Committee, NASA expedited their review and recommended to the PCIE Chair that the NASA IG attend the Federal Executive Institute for management training each year, and meet with the Deputy Administrator on a bi-monthly basis. Additionally, the Administrator announced that he would meet with the NASA OIG staff in order to listen to their concerns and express his support for their work.⁶

The PCIE Chair accepted these recommendations, and formally closed the case earlier this spring. After reviewing the NASA recommendations, the Integrity Committee subsequently notified the PCIE Chair that they believed the proposed course of action was inadequate and that further disciplinary action, up to and including removal, could be appropriate.⁷ This prompted the PCIE Chair to seek clarification as to what the Integrity Committee had recommended. In response to this request, the Integrity Committee Chair clarified that IG Cobb had not violated any laws or regulations; that the Integrity Committee Members had not come to a common conclusion as to how to address the issues raised in the ROI; that they were not now recommending removal as a disciplinary action; and that the original ROI did not contain actual recommendations.⁸ Since the PCIE's adoption of the NASA Administrator's recommended course of action, Sen. Nelson, Chairman Gordon, and Chairman Miller have called on the President to replace IG Cobb.⁹

Administrator's Meeting with NASA IG Staff

As part of the recommended course of action proposed by Administrator Griffin in his letter to the PCIE Chair, he indicated that he would address the OIG staff in order to listen to their concerns and express his support for their work. On April 10, Administrator Griffin scheduled a meeting at NASA Headquarters to do just that. The meeting was to be video-conferenced to all of the NASA Centers so that OIG staff in the field could also attend. Contrary to direction given by NASA Chief of Staff Paul Morrell that no recording of the meeting be made, the event was in fact recorded at the request of NASA Public Affairs, and signs were posted notifying everyone of that fact. During the

⁴ Ibid

⁵ Letter from Clay Johnson, Chair, PCIE to Michael Griffin, Administrator, NASA. February 15, 2007.

⁶ Letter from Michael Griffin, Administrator, NASA to Clay Johnson, Chair, PCIE. March 14, 2007.

⁷ Letter from James Burrus, Chair, Integrity Committee to Clay Johnson, Chair, PCIE. March 20, 2007

⁸ Letter from Clay Johnson, Chair, PCIE to James Burrus, Chair, Integrity Committee. March 29, 2007

⁹ Letter from Rep. Bart Gordon, Chairman, House Science and Technology Committee; and Rep. Brad Miller, Chairman, Subcommittee on Investigations and Oversight to President George W. Bush. April 2, 2007.

meeting, Mr. Morrell noticed that the event was being recorded. While he thought this was inappropriate, he decided not to interrupt the meeting. The next day he contacted the Video Teleconference Service (ViTS) operator, Fred Berger, to retrieve any and all copies of the recording, as he thought that the Public Affairs request to record the event was “highly inappropriate” since the event was intended to foster open communication with OIG staff, and public dissemination would have been a violation of that trust.¹⁰ Despite this intention, IG Cobb was present at the meeting, so any possibility of open communication and privacy may have already been lost.¹¹

Destruction of Video Tape

After learning that the meeting was recorded, Mr. Morrell collected all of the copies that were in Mr. Berger’s (as well as Public Affairs’s) possession and asked him to retrieve any others that may have been made.¹² He then handed the copies over to NASA General Counsel Michael Wholley. Mr. Wholley then made the determination that the CDs did not constitute official agency records, and eventually destroyed them.¹³ Mr. Wholley’s rationale for their destruction was that the tapes were not properly authorized to be recorded.

ISSUES

ViTS Copies and Federal Records

One of the central themes of this hearing focuses on the legal disposition of copies of ViTS meetings, and whether or not they fall under the legal definition of a Federal Record determined by the Federal Records Act and therefore deserving of retention and protection from destruction. NASA staff in the General Counsel’s office formulated a draft legal opinion subsequent to the tape destruction, but no final opinion was released. NASA never contacted the National Archives to seek an opinion as to the status of the records either. The Congressional Research Service has been tasked by the Committee to review the situation and offer an opinion.

Common practice within the agency, and amongst the ViTS operators, was to frequently destroy, erase, and tape over records they deemed to be on longer needed.¹⁴ If a determination is made that ViTS recordings do constitute Federal Records that should be maintained, then agency practices must be changed. Even prior to this instance, NASA did not treat ViTS recordings as Federal records.¹⁵ Regardless, the circumstances

¹⁰ Letter from Brian Chase, Assistant Administrator for Legislative and Intergovernmental Affairs to Rep. Miller, Chairman, Subcommittee on Investigations and Oversight, House Committee on Science and Technology. April 23, 2007

¹¹ Multiple interviews with NASA Office of Inspector General Staff, as well as NASA Staff.

¹² Science and Technology Committee Staff Interview with Fred Berger, NASA Headquarters Video Teleconference System Operator, May 8, 2007; and interview Paul Morrell, NASA Chief of Staff, May 9, 2007.

¹³ Letter from Brian Chase, Assistant Administrator for Legislative and Intergovernmental Affairs to Rep. Miller, Chairman, Subcommittee on Investigations and Oversight, House Committee on Science and Technology. April 23, 2007

¹⁴ Science and Technology Committee Staff Interview with Fred Berger, NASA Headquarters Video Teleconference System Operator, May 8, 2007

¹⁵ Ibid

surrounding the destruction of these recordings are not consistent with how an agency should handle records.

Authority to Request Recording of ViTS Meetings

Another issue that will be raised relates to who ultimately has the authority to request recordings of ViTS meetings. In this instance, a NASA Public Affairs official requested the taping of the meeting without notifying the Administrator or the Chief of Staff. NASA has argued that this was an inappropriate and unauthorized request since the meeting was intended for OIG personnel only, and was meant to foster a candid exchange.

Based on interviews with NASA and contractor staff, the assumption is to not record ViTS meetings, and that requests are made only about 20 percent of the time.¹⁶ The topics of these meetings are usually semiannual informational meetings that are taped in order to provide those staff that cannot attend the ability to view the meeting at a later time. Regular meetings such as the Administrator's weekly staff meeting, Human Resources related meetings, and General Counsel meetings, are not recorded.¹⁷

Decision to Destroy Copies Made at Centers

The Science Committee was unable to definitively determine who actually made the decision to destroy copies of the tapes that were made at the NASA Centers. After retrieving the copies from Fred Berger at NASA Headquarters, Paul Morrell asked that any other copies be forwarded to him as well.¹⁸ Mr. Morrell indicated that he was unaware that other copies existed at the Centers at that time. Mr. Berger indicated that he informed Mr. Morrell that Centers had asked for permission to record, but that he was unaware of whether or not any actually did. After inquiring with each Center, Mr. Berger determined that recordings were made at the Ames Research Center, Glenn Research Center, and the Jet Propulsion Laboratory, and requested that they destroy or erase their copies immediately. The aforementioned Centers are the only locations that recorded the meeting. The Committee has been unable to determine whether Mr. Morrell ordered the tapes at the Centers destroyed, or if Mr. Berger assumed this was what was requested without direction. Either way, the decision to destroy the tapes at the Centers was independent of Mr. Wholley's decision to destroy the copies at NASA Headquarters.

Center Copies vs. Headquarters Copies

Another complication in this matter involves the determination of whether the Center copies should be afforded the same protection from destruction even if the Headquarters copies were determined to be Federal Records. Assuming that the copies that were retained (and subsequently destroyed) by Mr. Wholley were in fact Federal Records that were to be preserved, in order to argue that the destruction of the Center copies were inappropriate, one would have to determine that any copies of official federal records are also afforded protection against destruction. If this were true, making this

¹⁶ Ibid

¹⁷ Ibid

¹⁸ Science and Technology Committee Staff Interview with Fred Berger, NASA Headquarters Video Teleconference System Operator, May 8, 2007; and interview Paul Morrell, NASA Chief of Staff, May 9, 2007.

extension would leave many agencies in an untenable situation were they would never be able to eliminate unnecessary duplicates of federal documents, since any and all reproductions carried the same legal importance as the original.

Wholley's Relationship with Cobb

After the Chair of the PCIE forwarded the ROI to the NASA Administrator for review and recommendations, Dr. Griffin delegated the General Counsel's office with the task. This may have created a conflict of interest because Mr. Cobb had sought Mr. Wholley's informed counsel on various issues relating to office management and the investigation itself. Because of this relationship, having Mr. Wholley review the investigation of Mr. Cobb may have been inappropriate. Mr. Wholley has indicated that he delegated the majority of the task to his staff, and that any decisions he made were purely professional.

Cobb's Attendance at the All-Hands Meeting

One of the primary reasons for the all-hands meeting between the Administrator and the OIG staff was to foster open communication. Having IG Cobb in the room, when many of the allegations against him came from within his office, seems to have negated any possibility for a free exchange of thoughts. Concern regarding this possibility was raised prior to the meeting by NASA staff, but was ultimately either dismissed or forgotten.

Griffin's Comments at the All-Hands Meeting

During the all-hands meeting, Dr. Griffin was posed a question by one of the OIG staff as to what types of work he found most helpful. His response, from what can be recalled from interviews and notes, was that investigations and audits relating to waste, fraud, and abuse were the most helpful. He also indicated that he did not find management or technical audits to be helpful since he believed the actual experts resided in NASA, and not the IG office. While IG staff found this to be extremely demoralizing, the Administrator's comments have no effect on what type of work the IG office can conduct, as they are not under the Administrator's control. These comments could, however, perpetuate the impression that there is a lack of independence between NASA and the IG office. In response to the Administrator's comments, IG Cobb indicated to staff that he thought the comments were inappropriate, but that they had no bearing on what work the IG office would undertake.

WITNESSES

The first two witnesses are current, high-ranking staff of the NASA Inspector General's office. They will testify as to the impact of Dr. Griffin's address to the OIG staff. They also have insights into the destruction of tapes.

Evelyn Klemstine, deputy inspector general for audits, NASA Office of Inspector General

Kevin Winters, deputy inspector general for investigations, NASA Office of Inspector General

The second panel of witnesses can speak to the disposition of the Cobb case by NASA when it was presented to the agency by PCIE. They can also speak to the relationship between Cobb and Wholley. Finally, they can address the manner and motive for destroying the recordings of Administrator Griffin's appearance before the IG staff.

Michael Wholley, general counsel, NASA

Paul Morrell, chief of staff, NASA